

CONFIDENTIALITY AGREEMENT

WHEREAS, the U.S. Environmental Protection Agency ("EPA") and the Nebraska Department of Environmental Quality ("NDEQ") are investigating hydrogen sulfide ("H₂S") and related pollutant and contaminant releases to air, water and land in or near the city of South Sioux City, Nebraska ("City");

WHEREAS, the EPA and the NDEQ share close and common interests in the enforcement of federal and state environmental laws and have been consulting with one another in anticipation of potential enforcement action relating to this investigation for violations of the Clean Air Act ("CAA"), 42 U.S.C. § 7401, *et seq.*, the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.*, the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 ("RCRA") and the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. § 6901, *et seq.*, or other environmental statutes administered by the EPA and the NDEQ pursuant to the Nebraska Environmental Protection Act, Neb. Rev. Stat. 81-1501 *et seq.*;

WHEREAS, the EPA and the NDEQ expect consultation to continue throughout any potential enforcement; and may lead to a joint prosecution of one of more facilities, including but not limited to Big Ox Energy, LLC ("Big Ox"), for causing or contributing to violations of federal and state environmental laws; and

WHEREAS, the EPA and the NDEQ, in pursuit of their common interest in resolving the H₂S situation in or near South Sioux City, Nebraska, agree to work together to protect their common interest by sharing information and communicating in confidence about claims, evidence, litigation strategy, settlement strategy, and other related subjects that will further their common enforcement goals.

NOW THEREFORE, the EPA and the NDEQ ("the parties") hereby agree as follows:

1. Non-Waiver. The EPA and the NDEQ acknowledge and agree that the common interest

privilege and confidentiality established by this Agreement is held jointly by both parties and that neither party is authorized to unilaterally waive the privilege with respect to any information or documents shared pursuant to this Agreement. All written and oral communications related to CAA, CWA, RCRA or other claims relating to H₂S releases are being made in anticipation of litigation. By sharing documents and communications with each other, the parties do not intend to waive any privilege, immunity, or other basis for confidentiality that otherwise applies to these documents and communications, and they specifically intend all applicable privileges to be preserved.

2. Confidentiality. If the parties exchange documents and communications with each other that otherwise are claimed to be privileged, immune from disclosure, or subject to another legal claim of confidentiality, the party sending such documents shall identify the sender and stamp or otherwise mark each such document as "privileged and confidential," and the party receiving the documents and communications shall take measures to ensure that the documents and communications remain confidential, including but not limited to (a) maintaining such documents in separate files from non-privileged documents, (b) restricting access to privileged files, documents or other information to the receiving party's attorneys or other legal or technical staff or consultants working on the above-styled actions or similar actions that have been or may in the future be brought by the parties, (c) requiring the parties' employees and consultants to maintain the confidentiality of any privileged documents or communications of privileged information, including but not limited to litigation or settlement plans, offers or strategy, (d) giving immediate notice to the party who provided the documents or communication if disclosure of any privileged document or communication is requested by any person who is not a party to this Agreement, including any other state, or by any agency of the State other than the agency that signed this Agreement, and (e) asserting the appropriate privilege(s) to decline any requested disclosure of

such documents or communications to any person who is not a party to this Agreement.

3. Disclosure by Agreement. Nothing herein shall prevent the parties from disclosing documents, communications, or information that is claimed as privileged to non-parties with the express, written permission of the authorized representative of the party who provided the information or as required by court order.

4. Public Disclosure. The EPA and the NDEQ agree that any information or documents shared pursuant to this Agreement shall not be subject to public disclosure pursuant to 5 U.S.C. § 552 and are exempt pursuant to 5 U.S.C. § 552(b)(2), (b)(4), (b)(5), and/or (b)(7), and the Nebraska public records statutes, Neb. Rev. Stat. 84-712 *et seq.*, or as required by court order. The parties specifically acknowledge, in accordance with Neb. Rev. Stat. 84-712.08, that the sharing of essential information contemplated by this Agreement would not otherwise occur but for the agreement of the NDEQ to protect the confidentiality of such information.

5. Termination. Any party may terminate its participation in this Agreement by 30 days prior written notice to the other party. However, the provisions of this Agreement, including the confidentiality requirements of Paragraph 2, shall continue to apply to all documents and communications exchanged prior to or during the pendency of this Agreement. The terminating party shall return all copies of privileged documents provided pursuant to this Agreement upon request by the party who provided the information, subject to any legal obligation to retain such materials.

6. Counterparts. This Agreement may be executed by counterpart. Additional state or federal agencies or citizens groups may become a party to the agreement upon written consent of the parties that are already part of the Agreement.

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY:

Date: 1/9/17

By: 

Karen A. Flounoy
Director, Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region 7

Date: 1/9/2017

By: 

Patricia Gillispie Miller
Senior Counsel, Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7

FOR THE NEBRASKA DEPARTMENT OF ENVIRONMENTAL QUALITY:

Date: January 6, 2017

By: 

Jim Macy
Director

Date: Jan. 6, 2017

By: 

Annette Kovar
Legal Counsel